UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA, Plaintiff, v. TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC.; COBB-VANTRESS, INC.; AVIAGEN, INC.; CAL-MAINE FOODS, INC.; CAL-MAINE FARMS, INC.; CARGILL, INC.; CARGILL TURKEY PRODUCTION, LLC; GEORGE'S, INC.; GEORGE'S FARMS, INC.; PETERSON FARMS, INC.; SIMMONS FOODS, INC.; and WILLOW BROOK FOODS, INC., Defendants.	Case No. 05-CV-0329 TCK-SAJ

CARGILL'S RESPONSE AND OBJECTION TO
PLAINTIFF'S MOTION TO SEVER OR STAY THIRD-PARTY CLAIMS

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The severance or dismissal of third-party claims proposed by plaintiff would leave the Court with half a case, forcing it to struggle to determine the existence and causes of and (if necessary) the remedy for the contamination the State alleges without the power to bind all the parties whose conduct may have contributed to the claimed problem under plaintiffs' version of events. Most troubling, the State asks the Court to sever or dismiss as parties its own subordinate government bodies, who appear to be among the most significant sources of the constituents to which the State objects. The case the State itself has commenced is both legally and factually complex, and including all the parties necessary for a full resolution of the issues presented will not add substantially to that complexity. Through case management orders and the good faith efforts of counsel, this Court is fully capable of dealing with any procedural or substantive issues this case may raise. Defendants/Third-Party Plaintiffs Cargill, Inc. and Cargill Turkey Production, LLC (collectively "Cargill") therefore urge the Court to deny plaintiff's motion.

A. Severance or dismissal would substantially depart from the normal and efficient practice of litigating all related claims in a single proceeding.

Plaintiff's motion all but ignores the fact that the relief it seeks—the artificial division of a group of factually and legally interdependent claims into two separate proceedings—departs significantly from the ordinary course of litigation under the federal rules. Although a court certainly has discretion to sever claims, such severance is the rare exception. The normal course is not only to permit but to compel the parties to litigate all factually related claims in a single lawsuit. The rules permitting and requiring

joinder of claims and parties,[1] the rule permitting and requiring cross claims, counterclaims, and third-party claims, [2] and the prohibition on splitting causes of action[3] all reflect this strong judicial preference for resolving all related claims in a single unitary action. The reasons for this preference are plain: judicial efficiency, consistency in result, and the increased public confidence that results from both.

Consistent with this, courts make every effort to see that all parties with an interest in or possible liability for a particular claim are joined in a single action to resolve that claim. The fact that an individual case may be complex or may involve a particularly large number of parties does not alter this presumption. Courts and parties involved in such cases have been creative, developing case management plans, adopting phased discovery and motion practice, and generally cooperating to assure both that all parties' interests are recognized and that justice is fully and efficiently done. In this way, courts have successfully managed complex litigation involving far more parties than are present here. See, e.g., New Jersey Dep't of Envt'l. Protection v. Gloucester Envt'l. Mgmt. Servs., Inc., 719 F. Supp. 315 (D. N.J. 1989) (CERCLA action involving more than 300 total primary and third-party defendants). The Magistrate Judge in Gloucester maintained the suit as a single proceeding, fashioned a series of case management orders to group defendants into subject matter categories with their own liaison counsel, altered the usual rules of service and joinder to simplify the filing of third-party complaints,

[1] Fed. R. Civ. P. 18, 19, 20.

[2] Fed. R. Civ. P. 13, 14.

[3] See, e.g., 18 Wright & Miller, Federal Practice § 4406; Texas Employers' Ins. Assoc. v. Jackson, 862 F.2d 491, 501 (5th Cir. 1988).

cross-claims, and counterclaims, and imposed orders limiting and organizing discovery and motion practice. See id. at 330; see also United States v. Berks Assoc., Inc., 900 F. Supp. 738, 742 (E.D. Penn. 1995) ("In re Reading Co."), and 1992 U.S. Dist. LEXIS 4978 (D. Pa. Apr. 1, 1992) (action involving 36 direct defendants and over 600 third-party defendants, dismissing only claims relating to EPA and bankrupt railroad); B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960, 961-62 (D. Conn. 1991) (in CERCLA case with approximately 200 third-party defendants, court organized the parties into groups by subject matter); Lore v. Lone Pine Corp., 1986 N.J. Super. LEXIS 1626, at *2-4 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (court used series of case management orders to streamline 464-defendant environmental and personal injury case through discovery and dismissal).

Courts most often depart from the presumed unitary action where a party has delayed too long in seeking to join additional parties to the case. Indeed, many of the cases plaintiff cites in support of severance involved not the severance of properly and timely joined parties, but the denial of motions to join additional parties brought late in the litigation. See, e.g., U.S. Fid. & Guar. Co. v. Perkins, 388 F.2d 771, 773 (10th Cir. 1968) (affirming denial of leave to serve third-party complaints where "the issues in the main case have been resolved and a judgment entered and satisfied"); In re CFS-Related Sec. Fraud Litig., 213 F.R.D. 435, 439 (N.D. Okla. 2003) ("To insert the Third-Party Defendants into this protocol and deposition schedule at this late date would prejudice the original parties to the action."); City of Wichita, Kan. v. Aero Holdings, Inc., 2000 WL 1480490, at *2 (D. Kan. Apr. 7, 2000) (denying leave to join and noting delay that

joinder would cause given advanced state of discovery and imminent deadlines for expert disclosures and factual stipulations).

Here, of course, the joinders of the third-party defendants were undisputedly timely, discovery has barely begun, and deadlines are months or years down the road. The circumstances present no reason to depart from the normal practice contemplated by the rules.

Less frequently, courts have severed third-party claims where the third-party claim simply has nothing in common with the main claim. For example, in Blais Construction v. Hanover Square Associates-1, 733 F. Supp. 149 (N.D.N.Y. 1990) (cited by plaintiff), the court severed a third-party claim against the FDIC on the ground that the new claim would introduce independent, complex federal statutory and choice-of-law issues into "a simple contract claim." Id. at 156-58; see also Beights v. W.R. Grace & Co., 62 F.R.D. 546, 549 (W.D. Okla. 1974) (also cited by plaintiff, granting severance and noting that "the basic issues of the two separated controversies or trials are essentially different").[4]

In contrast here, the inclusion of the third-party defendants will not "complicate the litigation unduly" or "prejudice the other parties in any substantial way." Arthur Anderson, LLP v. Standard & Poor's Credit, 260 F. Supp. 2d 1123, 1125 (N.D. Okla. 2003) (quoting 6 Wright, Miller & Kane, Federal Practice and Procedure, § 1460 at 457). The third-party claims involve the same central issues of law and fact as plaintiff's own

[4] Another case cited by plaintiff, In re Kaiser Steel Corp., 110 B.R. 20 (D. Col. 1990), involved a counterclaim rather than a third-party claim and rested largely on the absence of a compulsory counterclaim under the bankruptcy rules, id. at 24-25, and its facts thus have little relevance here.

claims against the defendants, and would neither cause the case to "mushroom in all directions," Perkins, 388 F.2d at 773, nor delay resolution of the principal claims. On the contrary, the presence of third-party defendants is necessary to a final, comprehensive ruling and judgment in this case. The Court should deny plaintiff's motion seeking to thwart a complete result.

B. As framed by plaintiff, this case is primarily about injunctive relief.

Plaintiff's motion to sever or dismiss overlooks the crucial fact that injunctive relief forms a central focus of plaintiffs' case, and that any injunctive relief that the Court might eventually grant could not be effective unless the Court has before it a substantial proportion of the parties contributing to the "problem" as plaintiff has defined it. Plaintiff's attorneys made their focus clear at the recent hearing on expedited discovery: They all but ignored any claim for damages and instead sought to alarm the court with unsupported assertions of threats to the environment and public health that plaintiff claims must be stopped through injunctive relief. See, e.g., March 23, 2006 Hearing Transcript at 10:8-20, 41:11-19.[5] Cargill strongly disputes that any such threats exist, but plaintiff clearly intends to style its case around such claims.[6]

Assuming purely for the sake of argument that the threat plaintiff posits actually exists, plaintiff seeks as a remedy a substantial reduction in the release of the cited

[5] Assuming that such a threat actually exists, plaintiff did not explain at the hearing why it has not sought to use any of the many other means at its disposal to stop these threats. The State has not posted beaches, closed drinking water supplies, or taken any of the other steps one would expect if the situation were as dire as plaintiff asserts.

[6] Plaintiff's complaint bears out this emphasis. Only a few of plaintiffs' counts seek damages, while fully eight of the ten seek injunctive or other equitable relief.

constituents into the IRW. Even plaintiff, however, does not allege that defendants are responsible for more than a small fraction of the present "contributors" of such constituents to the IRW.

As a result, any effective remedy for plaintiff's perceived "threat" would necessarily require changes in behavior by other sources in the IRW, and in particular by the large municipal point-source contributors against whom Cargill has asserted third-party claims. Unless these parties are before the Court and subject to whatever relief the Court might ultimately order, the "threat" that plaintiff urges has no chance of being eliminated. Indeed, this is one of the bases for Rule 19, which requires the joinder of a person if "in the person's absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a)(1). At the very least, the Court's removal of these third-party defendants from the case would limit its ability to remedy any perceived threat, forcing the Court to reduce the relief granted against the present parties to account for absent parties' contributions to the claimed threat. See, e.g., Burk v. Hondo Oil & Gas Co., 139 F.R.D. 695, 695 (W.D. Okla. 1991) ("to the extent that injunctive relief is impeded by this Court's inability to order the absent parties to comply, this Court will reduce Plaintiffs' relief").[7]

[7] In addition, at least one of the municipal third-party defendants has asserted its own counterclaim against defendants, seeking damages for its own alleged injuries quite apart from the injuries claimed by plaintiff. See Counterclaim to Third Party Complaint by City of Watts. The assertion of this counterclaim throws into sharp relief the possibility of inconsistent results to the defendants. Watts's counterclaim seeks relief from defendants based on precisely the same allegations of conduct as plaintiff makes. See Counterclaim to Third Party Complaint ¶ 2, 3. If defendants succeed in defeating plaintiff's claims (as they anticipate) while the City of Watts is severed or dismissed from

Notably, as far as the published decisions show, not one of the cases that plaintiff cites in support of its motion for severance or dismissal involved a claim for injunctive relief like the claims involved here. Certainly none of these cases discusses the issue or explains how injunctive relief to address a problem with many alleged contributors can be effective where some of the most significant contributors are not before the court.

In sum, plaintiff's focus on the remedy of injunctive relief as the centerpiece of this case weighs strongly against severance of the very parties who would be necessary to make such injunctive relief effective.

C. Cargill has asserted claims against only three State-related third-party defendants.

Cargill's individual joinder of a small number of specific third-party defendants presents additional reasons for denying severance as to those parties. Plaintiff acknowledges that Cargill has joined only two entities as third-party defendants: the cities of Tahlequah and Westville. Pl. memo. at 3. Cargill has also asserted cross claims against third-party defendant City of Watts.[8] In particular, Cargill has asserted third-party claims *only* against Oklahoma government bodies.

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the present case, the judgment against plaintiff will not be binding on the absent City of Watts. The defendants would still face the City's claim for relief, based on exactly the same allegations they would have already defeated, raising the distinct possibility of inconsistent results. Moreover, the presence of this counterclaim likely means that the Court cannot simply dismiss the third-party defendants. Plaintiff's motion neither acknowledges nor suggests on what ground the Court could properly dismiss the City of Watts' affirmative claim of entitlement to relief of its own from some of the defendants.

[8] Cargill intends to assert cross claims against Tahlequah Public Works, Westville Utility Authority, Adair County, Cherokee County, Delaware County, and Sequoyah County after our co-Defendants have filed their Amended Third Party Complaint.

Notwithstanding plaintiff's acknowledgement of Cargill's limited claims, its motion blithely treats all the third-party claims as if they were interchangeable and fails to address the distinctions in any way. Tyson and the other defendants/third-party plaintiffs who have joined in the broader third-party claims have sound reasons for their claims against the private third parties they have joined in this action, and Cargill not only accepts and respects those reasons but agrees that Tyson's response to plaintiff's motion is well taken. Nevertheless, Cargill has not taken the same course or asserted the same claims as these defendants, and plaintiff cannot ignore the additional issues presented by that distinction.

Cargill's claims raise several unique issues. First, all of the third-party defendants against whom Cargill asserts claims operate wastewater treatment plants, direct-point sources for the release of phosphorus and other constituent into the Illinois River and the IRW. Based on its preliminary investigation, Cargill believes that these point sources have discharged constituents into the IRW in excess of permitted amounts, and indeed are among the highest volume sources in the IRW for the phosphorus and some of the other constituents of which the State complains (far higher than any sources for which the State seeks to hold Cargill liable). If, as the State claims, this lawsuit is to arrive at a "solution" for the IRW's supposed "problem," that solution must certainly involve the sources that contribute the most to that problem.

In addition, all of the third-party defendants Cargill has joined are municipalities or municipal utilities, governmental bodies existing under and ultimately organs of the plaintiff itself, the state of Oklahoma. See Oklahoma Constitution, Art. XVIII, Municipal

Corporations, § 1. The State asserts that defendants are responsible for all the purported problems in the IRW; Cargill should at the very least be permitted to demonstrate that the State's own subordinate bodies are themselves substantial contributors to any such problems.

Finally, Cargill's third-party claims involve only three parties. Plaintiff's brief does not address this fact at all—it focuses entirely on the greater number of third-party defendants joined by some of the other defendants. Plaintiff itself, however, has joined 14 parties in this case, each with its own individual facts and issues. Indeed, the number 14 is deceptively small given the nature of plaintiff's claims. Plaintiff's complaint seeks to find each of the 14 defendants liable based on their claimed respective involvements with dozens, scores, or even hundreds of individual poultry farmers at different sites. See Complaint ¶¶ 1, 32-47. These farmers run different numbers and sizes of poultry operations, use various feed formulations, employ different contracts with the various defendants, and raise different types of birds, all variations that raise just the sort of individual issues of which plaintiff complains regarding the third-party defendants. Given its own choices in framing the allegations in its case, plaintiff can hardly complain of Cargill's claims against a mere three additional parties, particularly when those parties are (1) major contributors to the IRW and (2) organs of the State itself.

In sum, plaintiff's concerns about the mere number of third-party defendants—to the extent they have any validity at all—simply do not apply to Cargill's joinder of the state-related, major point-source contributors to the IRW.

D. The Court need not decide at this time complex legal issues addressing the merits of the parties' claims.

Plaintiff's motion also includes a number of arguments addressing the merits of its claims against the defendants, including issues such as the character of plaintiff's claims as intentional or unintentional, the availability of contribution and/or indemnity under plaintiff's nuisance, trespass, and CERCLA claims, and the State's own status as a PRP under CERCLA. As the brief discussion below demonstrates, these issues are legally complex and in many instances will require extensive discovery before the parties can address them adequately. Plaintiff's motion effectively seeks an early partial summary judgment on these issues, presented in the guise of a procedural motion.

The Court need not and should not reach these issues in the present motion. A court should not decide the propriety of a company's status as a party in a case based on a mere threshold assertion about the ultimate merits of the claim against that party. That is what the litigation itself is for: to permit the parties—*all* the parties—to gather the necessary information and present dispositive issues to the Court for resolution. The Court deserves and should require of the parties a full factual and legal analysis of the complex legal and factual issues plaintiff raises in its motion. The Court should not decide such crucial substantive issues based on superficial arguments and a non-existent record in the context of a preliminary procedural motion.

E. Plaintiff's legal arguments rely on mistaken facts and assumptions and present internal inconsistencies.

Even a cursory review of plaintiff's legal arguments against the third-party claims reveals another reason to defer decision on these central legal issues until the parties have

more fully developed both the record and the analysis: Plaintiff's arguments rely heavily on errors of fact and mistaken assumptions and present numerous internal inconsistencies.

Plaintiff's entire legal argument rests on its mistaken assertion that Cargill seeks "contribution and indemnity" from the third-party defendants and that "[n]o other claims are asserted against the third-party defendants." Pl. memo. at 3. Even the most superficial review of Cargill's Third-Party Complaint reveals that this simply is not true. In addition to contribution and indemnity, Cargill's third-party complaint seeks injunctive relief, declaratory judgment, and other equitable relief against the third-party defendant state bodies. See, e.g., Cargill Third-Party Complaint ¶¶ 47, 56, Prayer for relief ¶¶ 1, 3. Indeed, given plaintiff's own emphasis on injunctive relief, discussed above, Cargill's third-party complaint could hardly have done otherwise.

For example, plaintiff asserts that "Cargill's Third-Party Complaint…ha[s] attempted to assert claims for contribution and indemnity under RCRA/SWDA against the third-party defendants. See Cargill's Third-Party Complaint ¶ 56." Pl. memo. at 20. This is simply false. Paragraph 56 of Cargill's Third-Party Complaint makes *no mention whatever* of contribution or indemnity.[9] On the contrary, Cargill recognizes (as plaintiff's memorandum notes) that RCRA/SWDA provides for injunctive, not compensatory relief. See 42 U.S.C. § 9672. Consistent with this, Cargill's Third-Party Complaint seeks relief from third-party defendants in the form of participation "in any

[9] Nor does ¶ 221 of Tyson's third-party complaint, also cited by plaintiff.

injunctive relief, assessment, clean-up or remediation efforts." ¶ 56. Indeed, as discussed above, assuming for the sake of argument that plaintiff can actually demonstrate any problem with the IRW, it is doubtful that any injunctive relief could be effective in solving that problem unless *all* the claimed contributors to the presumed problem—including the third-party defendants—are involved. The injunctive relief at the center of plaintiff's claim and Cargill's third-party claim simply has nothing to do with the issues of contribution and indemnity.

Where Cargill *has* made claims for contribution and indemnity, plaintiff's arguments questioning the viability of such claims fare no better. For example, plaintiff's assertion that third-party CERCLA contribution claims will involve defenses not raised among the present parties, Pl. memo at 23, is in error. Plaintiff asserts that its CERCLA claim may rely entirely on CERCLA § 9607, the strict liability section, rather than on § 9613, the contribution section. At best, this appears to be wishful thinking on plaintiff's part. Under current Tenth Circuit law, a CERCLA plaintiff may invoke § 9607 *only* if it is not itself a PRP. E.g., United States v. Colorado & Eastern R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995) ("There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution.").[10]

[10] See also Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 168-69 (2004) (noting circuit authority for holding that plaintiff PRP may not recover under § 9607, including Colorado & Eastern case, but declining to address issue based on lack of briefing and lower court decision on issue).

Here, even plaintiff's own complaint strongly suggests that plaintiff is itself a PRP and must therefore proceed under section 9613 rather than 9607. Under CERCLA, a party is a PRP if it owned, operated, or arranged for disposal of hazardous substances at the facility in question. See 42 U.S.C. § 9607(a). Here, of course, plaintiff wishes to define the "facility" as the entire IRW watershed. Complaint ¶¶ 72, 81. Thus, the only way plaintiff could possibly avoid the litigation of contribution issues at trial would be to establish *as a matter of law* that it did not own or operate *any* part of the watershed during *any* of the alleged contamination *and* that it *never* itself arranged for the disposal of *any* hazardous substances *anywhere* in the IRW. Cargill doubts that even plaintiff would claim to be able to make such a factually indisputable showing.

In addition, plaintiff's arguments concerning the availability of contribution and indemnity for its nuisance, trespass, and CERCLA claims are internally contradictory. Plaintiff claims that defendants are "jointly and severally" under these theories. Pl. memo. at 12, 14, 21. Yet plaintiff's memorandum itself acknowledges that, where parties are jointly and severally liable, *contribution is available*. Pl. memo at 17 (quoting OKLA. STAT. TIT. 12 § 832(A): "When two or more persons become jointly or severally liable in tort for the same injury to the person…, there is a right of contribution among them…" (emphasis by plaintiff)).

Here, assuming for the sake of argument that actionable contamination occurred in the IRW, Cargill contends that the third-party defendants contributed to that contamination as much or more than plaintiff alleges Cargill did, and did so through conduct of the same character as the State alleges against Cargill. Under these

circumstances, the law offers no principled basis to impose joint and several liability only on the parties that the State chose to name as defendants and not on other parties who are equally or more culpable but whom the State elected not to name (perhaps because these parties are themselves organs of the state). The State's position on contribution is internally inconsistent and does not support severance.

F. Discovery will need to be done as to these municipalities anyway.

Most of the issues presented by the numerous other entities that contributed to the IRW—governmental or otherwise—will need to be addressed in this case in any event, *regardless* of whether the third-party defendants are active parties in the case or not. The third parties' role in any claimed contamination obviously and unavoidably goes to issues of causation, apportionment, damages, and the form and extent of any injunctive remedy. Discovery from third parties, particularly from the State's own subordinate organs, will also bear on issues of plaintiff's own contributory fault and other defenses. Conducting this discovery against non-parties will present more difficulties for the parties and will complicate the Court's task in overseeing the discovery process in this undeniably large case. Both the Court and the parties will be far better served by having these third parties actively before the Court, where the Court's decisions will be binding on them, rather than as marginally accessible sideline players whose conduct the Court cannot reach with either the same ease or the same effectiveness.

CONCLUSION

For the reasons set out above, Cargill urges the Court to deny plaintiff's motion to sever, stay, or dismiss the third-party claims.

Respectfully submitted,
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